Supreme Court, U.S.
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No. 00-1760

IN THE

Supreme Court of the United States

GREGORY G. EHMANN,

Petitioner,

v.

NORFOLK SOUTHERN CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the court of appeals err in deciding that the district court properly dismissed petitioner's SAA claim because inadequate lubrication on an otherwise fully functioning drawbar does not provide a basis for strict liability?

STATEMENT PURSUANT TO RULE 29.6

There is no parent or public company owning 10% or more of Norfolk Southern Corporation's stock.

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COUNTER STATEMENT OF THE CASE

Petitioner filed an FELA and SAA action against respondent for personal injuries sustained on August 6, 1997 when he attempted to straighten a drawbar that had become misaligned. Petitioner admitted that it was a routine practice to add grease when he encountered a drawbar that is difficult to center due to inadequate lubrication (R.1; Tr. Vol. I pp. 112), and he was eventually able to couple the drawbars (R.19, Ehmann depo at p. 71).[1] Accordingly, the district court granted respondent partial summary judgment to dismiss the SAA claim. The case proceeded to trial on petitioner's theory that inadequate lubrication constitutes negligence under the FELA. The case was tried to a federal jury which unanimously found that respondent was not negligent and returned a defense verdict (R. 76).

Petitioner did not appeal the jury's finding of no negligence under the FELA, but instead argued that the district court misinterpreted *Norfolk & Western Ry. Co. v. Hiles*, 516 U.S. 400 (1996), as well as *Kavorkian v. CSX Trans., Inc.*, 117 F.3d 953 (6th Cir. 1997), when it dismissed his SAA claim (Op. at 7a of Petition). The United States Court of Appeals for the Sixth Circuit affirmed, and expressly applied the framework recently set forth in *Kavorkian* to test the sufficiency of petitioner's SAA claim:

> [A]t least in a case where coupling had been attempted, the plaintiff proves his claim under [the SAA] by demonstrating (1) that the train couplers failed to couple automatically or failed to remain

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1. As noted by the appellate court, although petitioner changed his testimony at trial and claimed for the first time that he was never able to couple the cars, petitioner's deposition testimony that he was able to successfully couple was the only evidence before the district court when it properly dismissed the SAA claim (Op. at 4a of Petition).

> coupled until purposely released, and (2) that this failure caused, in whole or in part, the plaintiff's injury. A defendant may rebut the plaintiff's case by proving both (1) that the equipment was not properly set, *e.g.*, that the drawbars were not properly aligned or that one of the knuckles was not open, and (2) that a defect in the equipment did not cause the equipment to be improperly set, *i.e.*, the equipment became improperly set during the ordinary course of railroad operations.

(Op. at 8a and 9a of Petition).

This framework reflects the rule in *Hiles* at pp. 412-413 that "a misaligned drawbar simply is not a violation of [the SAA]" but rather SAA liability only applies to injuries caused by "*malfunctioning equipment*."

While acknowledging that petitioner had satisfied his two necessary items to state an SAA claim under the framework, the appellate court correctly found that respondent presented sufficient evidence to the district court to rebut its liability as a matter of law under that same framework:

> It first established that Ehmann had opened both knuckles before attempting to align the off-center drawbars, and noted Ehmann's concession in his deposition testimony that he was eventually successful in coupling the misaligned drawbars. His only evidence of "malfunction" was that unevenly distributed lubrication caused the drawbar in question to suddenly stop.
>
> * * *
>
> We agree with the district court that this fact, even if true, is insufficient to establish that the drawbar

> "malfunctioned" within the meaning of the SAA. As Norfolk Southern argues, the lubrication of drawbars is a part of routine maintenance. We have found no case holding that inadequate lubrication on an otherwise fully functioning drawbar provides a basis for strict liability under the SAA, and none has been cited to us by Ehmann.
>
> Inadequate lubrication, on the other hand, might well provide the basis for Norfolk Southern's liability on the theory of negligence. But that was the question presented to the jury under Ehmann's FELA claim.

(Op. at 9a-10a, and 11a).

Petitioner has since abandoned his argument under *Hiles* and *Kavorkian*, and remarkably fails to cite either decision in his Petition. Instead, petitioner contends that a lower standard for proving a defect under the SAA should apply, and relies on *Myers v. Reading Co.*, 331 U.S. 477, 483 (1947) which holds that a handbrake is defective under the SAA if it is wholly "incapable" of performing the desired effect. However, even accepting that *Myers* somehow provides a different or lower framework than that set forth more recently in *Hiles* and *Kavorkian*, the appellate court correctly found that:

> In Ehmann's case, there is no evidence that the drawbar would not have functioned properly but for the unevenly distributed lubrication. As such, it cannot be said that the drawbar was *incapable* of performing or producing the desired effect.

(Op. at 11a of Petition).

Thus, under *Myers, Hiles,* and *Kavorkian*, the appellate court affirmed.

REASONS FOR DENYING THE WRIT

When respondent moved for partial summary judgment, it presented sufficient evidence to rebut petitioner's SAA claim by demonstrating that the drawbars were not properly aligned, and that the misalignment occurred during the ordinary course of railroad operations. Not only does misalignment due to inadequate lubrication not constitute a "malfunction" and not render the drawbar "incapable" of performing, such misalignment is an everyday occurrence. Indeed, it was routine practice for petitioner to add grease to an inadequately greased drawbar in order to align it, but he failed to do that here.

The district court, and the appellate court, properly found that dismissal of petitioner's SAA claim was appropriate under *Hiles* and the framework set forth in *Kavorkian*. As explained in *Goedel v. Norfolk & Western Ry. Co.*, 13 F.3d 807, 811-812 (4th Cir. 1994), which the appellate court noted is "most similar" to that of petitioner's claim (Op. at 11a of Petition), a "frozen" drawbar does not constitute a defective drawbar under the SAA:

> In fact, Goedel testified that the knuckle on the Southern car was open and the cars would have coupled had the knuckles been aligned properly, but he argues that the drawbar on N & W's car was frozen and was incapable of being aligned properly. However, his position is not supported by the evidence which reflects that the car with the allegedly frozen drawbar was later coupled to another car. While the drawbar may have been difficult to move, the fact that the N & W car was coupled and transported after the accident demonstrates that the drawbar was not absolutely frozen. The district court determined that the N & W coupling mechanism, the drawbar and the knuckle together, was not defective and after reviewing the record in the light most favorable to

> Goedel, we agree with the district court and conclude that there was no violation of the Safety Appliance Act because there was no proof of defective coupling equipment.

To the same effect is *Lisek v. Norfolk & Western Ry. Co.*, 30 F.3d 823 (7th Cir. 1994), and *Reed v. Philadelphia, Bethlehem & New England R.R. Co.*, 939 F.2d 128 (3d Cir. 1991), both of which held that mere misalignment resulting from ordinary rail yard operations does not constitute a defect under the SAA.

Petitioner's reliance on five cases, each of which pre-date *Hiles* and *Kavorkian*, is misplaced. In *Myers*, plaintiff prevailed because the defendant failed to comply with the SAA's requirement that cars be equipped with "efficient hand brakes;" instead, the brake was deemed "inefficient" because of either its defective condition or its defective functional operation. 331 U.S. at p. 484. In contrast, the SAA does not require "efficient" drawbars but rather drawbars with couplers capable of coupling automatically when properly aligned. Even under the *Myers* test, petitioner offered no evidence that the drawbar would not have functioned properly but for the inadequate lubrication. In other words, there is no evidence that the drawbar was incapable of performing as intended. *Long v. Union R. Co.*, 175 F.2d 198 (3d Cir. 1949), also cited by petitioner, also concerned an allegedly "inefficient" handbrake. Likewise, petitioner mistakenly relies on *Richmond, F. & P.R. Co., v. Brooks*, 197 F.2d 404 (D.C. Cir. 1952), which does not involve a coupler, but instead a claim that a carrier violated the SAA's mandate for a train-brake system when it divided the power brake control between the engineer and conductor instead of giving constant exclusive control to the engineer. In *Grogg v. Missouri Pacific R. Co.*, 841 F.2d 810 (8th Cir. 1988), also cited by petitioner, it was undisputed that an air hose became completely disconnected from the train car which sent the train into an emergency stop. No such events occurred in the case at hand however.

The only case relied on by petitioner involving an allegedly defective coupler is *Phillips v. Chesapeake & Ohio Ry. Co.*, 475 F.2d 22 (4th Cir. 1973), which, again, long predates *Hiles* and *Kavorkian*. Unlike the instant case, the injury in *Phillips* did not occur while the brakeman was aligning a drawbar but rather occurred when the brakeman attempted to pull a cut lever to release a pin which would not stay in place. Ehmann, on the other hand, encountered no such malfunction.

Petitioner fails to cite to a single case holding that inadequate lubrication on an otherwise fully functioning drawbar provides a basis for SAA liability. Petitioner cites no support for his contention that a drawbar which is heavy or difficult to move is defective under the SAA. Notably, petitioner wholly ignores *Hiles, Kavorkian,* and all other misaligned drawbar cases decided in the last ten years.

As recently ruled in *Hiles*, a misaligned drawbar simply is not a violation of the SAA. Under *Kavorkian's* framework, an SAA coupler claim is rebutted where it is undisputed that the coupling did not occur because the drawbars became misaligned during the ordinary course of railroad operations. Petitioner's suggested conflict amongst the circuit courts is imaginary. This court settled the issue in *Hiles*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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